

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

**DVA17 v Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs [2022] FedCFamC2G 91**

File number(s): SYG 2668 of 2017

Judgment of: **JUDGE HUMPHREYS**

Date of judgment: 18 February 2022

Catchwords: **MIGRATION** – Minister for Immigration and Border Protection – whether ss 91W and 91WA of the *Migration Act* applied correctly – whether delegate’s task under ss 91 and 91WA affected by jurisdictional error – no jurisdictional error – application dismissed.

Legislation: *Migration Act 1958* (Cth), ss.5, 36, 57, 91, 91W, 91WA, 487ZJ

Cases cited: *Avon Downes Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353
BGM16 v Minister for Immigration and Border Protection [2017] FCAC 72
Sun v Minister for Immigration and Border Protection [2016] FCAFC 52

Division: Division 2 General Federal Law

Number of paragraphs: 60

Date of last submission/s: 10 February 2022

Date of hearing: 10 February 2022

Place: Parramatta

Solicitor for the Applicant: Mr Hodges

Counsel for the Respondents: Mr Kaplan

ORDERS

SYG 2668 of 2017

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

**BETWEEN: DVA17
Applicant**

**AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent**

**DELEGATE OF THE MINISTER FOR IMMIGRATION &
BORDER PROTECTION (POSITION NO:60022632)
Second Respondent**

ORDER MADE BY: JUDGE HUMPHREYS

DATE OF ORDER: 18 FEBRUARY 2022

THE COURT ORDERS THAT:

1. The name of the First Respondent be changed to the Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs.
2. The application is dismissed.
3. The Applicant is to pay the First Respondent's costs fixed in the sum of \$7328.00.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE HUMPHREYS

INTRODUCTION

- 1 The applicant claims to be a citizen of Afghanistan. The applicant first arrived in Australia as an unauthorised maritime arrival on 5 May 2013. On 13 September 2016, the applicant applied for a XE-790 Protection visa. Enclosed with the applicant’s application were copies of his Afghan passport and identity card or Taskera.
- 2 On 11 November 2016, the applicant was invited to an interview with a Departmental officer and was asked to bring with him the originals of any identity documents in his possession.
- 3 The applicant attended an interview on 9 December 2016 and provided his original passport. On the same day the Department, pursuant to s 487ZJ(2) of the *Migration Act 1958* (Cth) (“the *Act*”), seized the applicant’s passport on the basis that it was reasonably suspected that the passport was bogus within the meaning of s 5(1) of the *Act*.
- 4 On 12 December 2016, the Department wrote to the applicant, pursuant to s 57 of the *Act*, inviting the applicant to provide a reasonable explanation for producing a bogus document and produce evidence of his identity, nationality or citizenship or take reasonable steps to do so.
- 5 On 22 December 2016, the applicant provided a submission. The applicant claimed that his documents were genuine. Further, on 5 January 2017, the applicant’s representative provided to the Department a document being a letter dated 23 December 2016, from the Afghan Embassy in Canberra which “confirm[ed] that [the applicant] is an Afghan citizen”. The Court notes that the submission did not address the issue of whether the passport was fraudulently obtained.
- 6 On 17 March 2017, the Department wrote to the applicant informing him it was suspected that the applicant was a national of Pakistan and invited him to explain why he could not relocate within Pakistan to avoid the persecution that he claimed at the hands of extremists.
- 7 On 27 July 2017, a delegate of the then Minister for Immigration and Border Protection (“the delegate”) refused to grant the applicant a Protection visa. The delegate was not satisfied that the applicant was a person to whom Australia owed protection obligations. Further, the application was also refused as the delegate was satisfied under s 91WA(1) of the *Act* as the

applicant had provided a bogus document as evidence of his identity, nationality or citizenship without a reasonable explanation for doing so.

8 The applicant now seeks judicial review of the delegate's decision.

THE DELEGATE'S DECISION

9 Given the ground of judicial review relied upon and set out below, it is not necessary to completely summarise the delegate's decision.

10 Under the heading "Identity Assessment", the delegate noted the applicant provided the following personal identifiers to the Department:

- bio data information including name, date of birth and signature;
- biometric photograph;
- biometric fingerprints.

11 The applicant claimed that he was born on 2 May 1994. The applicant claimed that he had no alias identities. The applicant claimed that he was a Shia Hazara who was born in Tehran to undocumented Afghan parents who originate from Oruzgan province, Afghanistan. The applicant lived in Iran illegally and was never issued with identity documents. When the applicant was approximately six years of age, his family were deported from Iran to Afghanistan. The applicant's family left Afghanistan immediately and settled in Quetta, Pakistan where he lived illegally without any identity documents until he fled to Australia in 2013. The applicant claims to be a citizen of Afghanistan and does not have a right to reside in any other country. The applicant has eight siblings, four siblings are Australian permanent residents and one sibling is an Australian citizen.

12 Under the heading "Language and Hazara Origins", the delegate noted that the applicant spoke the Hazaragi language with a Pakistani dialect rather than an Afghan dialect.

13 The delegate found the fact that the applicant spoke a Pakistani dialect of Hazaragi, had no knowledge of his Hazara origins in Afghanistan and was resident in an area of Quetta associated with Hazara's who have a long-standing residency, suggested that the applicant did not originate from the undocumented Afghan refugee population in Quetta.

14 Under the heading "Identity Documents from Pakistan", the delegate noted that the applicant claimed he did not have any Pakistani proof of identity documents, including any UNHCR Proof of Registration Card (PoR). At his interview, the applicant claimed that he had never

been issued with any identity documents and was never asked to provide any identity documents in Pakistan. The delegate indicated that there were numerous security checkpoints in the Hazara district of Quetta. The applicant indicated that he would normally bribe his way through the various security checkpoints without having to provide any identity documents. The applicant was asked why he didn't apply for a PoR card, to which he answered "I never thought of that and nobody ever told me how to obtain one". The delegate concluded that it was reasonable to assume that the applicant would have applied for a PoR card had he been able to do so as an Afghan refugee. The fact that the applicant was in communication with family members in Pakistan, who had access to mobile phones and the Internet, was inconsistent with his claim to originate from a family of undocumented Afghan refugees in Pakistan.

15 Under the heading "UNHCR document", the delegate noted that the applicant was in possession of a UNHCR document in another identity upon his arrival in Australia in 2013. The applicant claimed that the document belonged to his roommate in Indonesia. A facial comparison of the UNHCR document was made and was put to the applicant that the photograph was similar to him. The applicant said that the UNHCR document had been accidentally placed in his bag by his roommate in Indonesia prior to his journey to Australia. The delegate noted that Departmental systems do not indicate any unauthorised maritime arrival who arrived in Australia in the identity stated in the UNHCR document. Given that the applicant was in possession of the UNHCR document and the facial image in that document matched the facial image of the applicant, this led the delegate to believe that the UNHCR document belongs to the applicant. This cast significant doubt on the applicant's claimed identity.

16 Under the heading "Subclass 117 (Orphan Relative) visa application", the delegate noted in the decision record that Departmental records indicate that the applicant formed part of a subclass 117 (Orphan Relative) visa application in 2012 in his claimed identity, which was refused by the Department on 10 October 2013. The delegate put to the applicant that the Department had recorded significant identity concerns at that time, concerning the authenticity of his identity documents, his claimed age, and his claim to form part of the family unit.

17 The applicant stated that he knew of the application that had been refused, but he didn't know the reasons for its refusal. Departmental records indicate that significant concerns were

expressed regarding the applicant's claimed age and the authenticity of his Afghan passport and Afghan identity card produced at the time. The delegate found that this information cast significant doubts on the applicant's claimed identity.

18 Under the heading "Afghan Driver's Licence", the delegate noted that at the applicant's interview, he indicated that he had never been issued with any Afghan identity documents other than his passport and identity card. The applicant confirmed that he had never returned to Afghanistan since leaving as a child in approximately 2000.

19 Information was put to the applicant indicating that a passenger, returning to Australia from Pakistan, was questioned at Perth airport in August 2013 regarding an Afghan driver's licence that he had in his possession which contained the applicant's claimed identity details. The applicant stated that he "had no idea". The applicant was asked again if he had ever held an Afghan drivers licence. The applicant replied that he was unsure, but had possibly had held one. The applicant said that he had possibly forgotten as he had a poor memory. In relation as to why he might be in possession of an Afghan drivers licence, given that he had not been in Afghanistan since he was a child, the applicant stated "you have to pay and you can obtain it... There are agents there who can obtain it for you". The applicant was asked if the Afghan drivers licence was genuinely issued or if it was a fraudulent document. The applicant stated that he did not know, and, "how can I know if it is fraudulent or genuine?". The applicant indicated that the Afghan drivers licence was arranged in Quetta, but that he was not sure if it is issued in Afghanistan or not. The applicant was asked about the current location of the licence. The applicant indicated that he had never taken receipt of the document and was unsure what happened to it.

20 The delegate determined that he did not accept that the applicant's poor memory adequately explained why he did not declare an Afghan drivers licence as part of his Protection visa application. The delegate did not find it plausible that the applicant would be in possession of a genuine Afghan drivers licence given his particular circumstances, especially as there is no country information which indicates Afghan citizens can obtain Afghan drivers licences outside Afghanistan from Afghan consulates or embassies. The delegate concluded that the Afghan driver's licence, which was sighted by a Departmental officer at Perth Airport in August 2013, was not genuinely issued by Afghan authorities, and that it was procured by the applicant to materially enhance his claim to be an Afghan National.

- 21 Under the heading “Assessment under s91WA – Providing bogus documents or destroying identity documents”, the delegate concluded that the Afghan identity card (Taskera) and the Afghan passport the applicant had provided to the Department as part of his protection visa application were bogus.
- 22 In coming to this conclusion, the delegate noted that the applicant claimed that he had obtained his Afghan passport and identity card from the Afghan consulate in Quetta, Pakistan. The applicant gave confused and conflicting evidence how he obtained each document. For example, the applicant had claimed his Afghan identity card had been issued in Afghanistan rather than in Pakistan and obtained by “an agent in Quetta” who travelled to Afghanistan on his behalf.
- 23 It was put to the applicant that country information indicated that it was not possible to obtain an Afghan identity card outside Afghanistan in the manner the applicant had described. The applicant was queried if he had obtained his Afghan documents fraudulently from Afghan authorities given the prevalence of fraudulent documents that originate from Quetta in Pakistan. The applicant indicated that his older brother had organised his Afghan documents, however he was unsure if they were genuine. The applicant later indicated that he was “unsure” how his Afghan documents had been obtained and maybe his Afghan documents had been organised by another relative or friend in Pakistan.
- 24 The delegate noted discrepancies in relation to the applicant’s date of birth. The applicant was unable to satisfactorily explain why his Afghan passport contained a precise date of birth being 2 May 1994, however his Afghan identity card indicated only an approximate year of birth. It was put to the applicant that Afghan authorities in the consulate in Quetta would not issue Afghan identity documents at approximately the same time containing different dates of birth. It was reasonable to assume that the identity details in his Afghan passport would be consistent with the identity details in his identity card.
- 25 As noted, the applicant was invited to provide a reasonable explanation for providing what the delegate concluded was a bogus document in relation to identity, nationality or citizenship. The applicant reiterated that his Afghan passport was genuine but that he was not sure about the authenticity of his identity card as it was organised by his brother. In subsequent submissions provided by the applicant’s migration agent, it was reiterated that the passport was genuine but the identity card had been obtained by “an agent” who travelled to Afghanistan to obtain it from Afghan authorities on his behalf. The delegate stated that they

were aware that all Afghans are required to return to the family's place of residence or to Kabul to apply for a Taskera (ID Card). The delegate did not accept that this document could be obtained by an agent as claimed.

26 Accordingly, the delegate was satisfied that the Afghan identity card was a counterfeit document as defined by s 5(1)(c) of the *Act*. The delegate was satisfied that the applicant had not explained the numerous inconsistencies in his previous testimony as to how he had obtained his Afghan passport. The delegate concluded that the applicant was in fact a Pakistani national and that his Afghan passport is also a bogus document in that it had been fraudulently obtained from Afghan authorities in Pakistan.

27 The balance of the decision deals with the applicant's protection claims and are based on a finding that the applicant is a member of the indigenous Hazara community in Pakistan. The delegate found that there was no credible evidence to support the applicant's claim that he was an Afghan citizen born to undocumented Afghan refugees in Tehran. The delegate did not accept that the applicant lost his Afghan passport and identity card shortly before departure from Pakistan. The delegate was satisfied that the applicant left Pakistan using his own genuine Pakistani passport. The delegate was not satisfied that the claims made by the applicant in relation to the need for protection was sufficient under s 36(2)(a) or (aa) of the *Act*.

GROUNDS FOR JUDICIAL REVIEW

28 The sole amended ground of judicial review relied upon is set out the applicant's written submissions filed with the Court on 27 January 2022. It is as follows;

1. The delegate of the Minister erred by incorrectly applying the test under ss 91W and 91WA of the *Migration Act* when considering whether the applicant had produced a bogus document.

29 The particulars are as follows:

- a) S. 91WA(1)(a) refers to "the applicant provides", this means the applicant for the protection visa.
 - i. As referred to in *BMG16 v Minister for Immigration and Border Protection* [2017] FCAFC 72, this means "just as with s.91W the person whose conduct is the subject matter of the provision must be an applicant for a protection visa".
 - ii. The Respondent took into account documents not produced by the application in support of his protection visa including documents produced by the applicant's brother (in relation to the Orphan Relative visa application), by an unknown third

party (a driver license) and “found in the possession of the applicant” (the UNHRC letter.

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- (b) – (f) Not pressed.
- (g) In reaching the decision that there was a reasonable suspicion that the applicant’s Passport and Taksera were bogus documents, the Respondent took into account irrelevant considerations,
 - i. The applicant repeats the matters referred to in (a) above.
- hi) In reaching the decision that there was a reasonable suspicion that the applicant’s Passport and Taksera were bogus documents, the Respondent failed to take into account all relevant considerations,
 - i. Consistency in photographic images of the applicant over the years from the issue of the Passport (2011), the Arrival interview (2013) to the certified photo on the SHEV applicant’s;
 - ii. Consistency in the assertions by the applicant as to his identity and birth date;
 - iii. Consistency in the assertions by the applicant that his documents were genuine;
 - iv. The email and certification dated 5 January 2017 from the Afghanistan Embassy, and of overriding significance.
 - v. The forensic report on the applicant’s passport forwarded to the decision maker on 10 January 2017.

(j) The respondent failed to complete the task required by s91W(2) and (3)

THE APPLICANT’S SUBMISSIONS

30 After setting out the definition of bogus documents in s 5 of the *Act* and the terms of s 91W of the *Act*, it was conceded that the applicant’s Taskera and passport were documentary evidence of his identity nationality and citizenship. It was also conceded that the applicant produced them in relation to this Protection visa application.

31 Reliance was placed on *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52 at [17] per Logan J who said:

...But the pejorative quality in concluding that a document is a bogus document as defined is about the document, not about the applicant’s or any other person state of knowledge and, even then, all that need be present is material to raise a reasonable suspicion.

32 In their joint judgement in the same matter, Flick and Rangiah JJ at [36] quote Latham CJ in *The King v Connell; Ex parte The Hetton Bellbirt Collieries Ltd* (1994) 69 CLR 407, who said:

If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation then it must be held that the opinion required was not formed.

33 The Court was also taken to *Avon Downs Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J, and *BGM16 v Minister for Immigration and Border Protection* [2017] FCAC 72 at [77]–[81] Wigney JJ. In particular, as set out at [81], there is a temporal limit in the legislation in that the provision of the bogus document must occur during or in connection with the application for a Protection visa.

34 It was submitted that the principles which emerge from the above authorities include:

- the respondent must in reaching the decision take into account all of the circumstances which include known facts and those which could reasonably be known;
- the respondent must come to the consideration with an open mind;
- the respondent should not take into account irrelevant or extraneous matters;
- The respondent must complete the task in relation to s91W(2 and 3). Having given a notice, the Respondent did not ever engage with the applicant's response (2). By this it is meant that having seized the applicant's passport and given notice to the applicant to give reason for the production of bogus documents or produce evidence of identity, nationality or citizenship, the respondent failed to relevantly engage with the applicant's response. That is the applicant's claim that the documents were genuine and corroborated by the additional document from the Afghan embassy

35 It was submitted that it was a known fact that both the applicant's passport and Taskera, or at least copies thereof, were produced to the respondent by the applicant's brother as part of the Orphan Relative visa application.

36 The applicant's passport was seized and sent to a forensic document examiner. That examiner produced a report which does not appear to be mentioned in the respondent's decision. This was clearly a fact that was known within the wider compass of government and should have been taken into account.

37 The first respondent did not come to the formulation of the suspicion with an open mind. The decision-maker relied on the misgivings of other Departmental officers earlier involved in the orphan relative process. Similarly the decision-maker relied upon irrelevant and extraneous

materials. This included documents not produced by the applicant support of the protection Visa application being the UNHCR letter and the Afghan drivers licence.

38 The first respondent failed to engage with the applicant’s “explanation” being that his documents were genuine and he had a letter from the Afghan Embassy to support that claim. It seems that s 91W of the *Act* invokes a bizarre proposition that an applicant can have a reasonable explanation for producing bogus documents. On the other hand, the explanation that the documents are genuine and here, some more evidence of this fact was rejected out of hand.

THE FIRST RESPONDENT’S SUBMISSIONS

39 After setting out the background to the matter in his written submissions, Counsel for the first respondent noted in relation to the claim that the applicant did not provide bogus documents the applicant confuses the documents found to be ‘bogus’ being his Afghan identity card and passport with those which were not, being the UNHCR letter and the driver’s licence. There is no question that the applicant provided the Identity card and passport.

40 In relation to the claim that the delegate took into account documents not provided by the applicant, being the Orphan’s Visa application, the driver’s licence and the UNHCR Letter in relation to his identity, none of these featured in the assessment, for the purposes of s 91WA of the *Act*, of whether the applicant had provided a bogus document as evidence of his identity, nationality or citizenship.

41 In relation to the claim that the delegate failed to take into account relevant considerations and did not complete his task, the use of the phrase ‘relevant considerations’ is inapt as the first respondent is not required to take into account any particular matter in satisfying himself or herself that a document meets the description of a bogus document as contained in any of sub-paras (a)-(c) of s 5 of the *Act*.

42 The delegate made a number of findings in relation to the Afghan identity card and passport as follows: (see; CB188 – 190 under the heading “Assessment under s.91WA):

- At his SHEV interview the applicant claimed he had obtained his Afghan passport and Afghan identity card from the Afghan consulate in Quetta, Pakistan. The applicant gave confused and conflicting evidence regarding how we obtained each document...
- .. The applicant indicated his older brother had organised his Afghan documents; however, he was sure they were genuine documents. Later he indicated he was ‘unsure’ how his Afghan documents had been obtained and

maybe his Afghan documents have been organised by another relative or friend in Pakistan.

- The applicant provided two separate translations of his Afghan identity card as part of his SHEV application. I queried with the applicant which translation provided his correct date of birth is the Afghan translation of his Afghan identity card... gave his date of birth as 02 May 1994; however the NAATI translation of his Afghan identity card... gave only an approximate year of birth. The applicant confirmed that the NAATI translation of his Afghan identity contained his correct date of birth as he was not aware of his precise date of birth – he had earlier claimed his precise date of birth was 2 May 1994. The applicant provided inconsistent and conflicting evidence regarding his date of birth throughout his SHEV interview...

Following a natural justice break, the applicant reiterated that his Afghan passport was genuine; however, he was unsure about the authenticity of this Afghan identity card as it was organised by his brother...

43 In relation to photographic images, the delegate did not find that the applicant was not the person in the photographs on his Afghan passport and identity card. They had no bearing on the finding that the former was obtained fraudulently from Afghan authorities in Pakistan and that the latter was counterfeit.

44 The applicant complains that the delegate did not take into account submissions that he made on 22 December 2016, including a letter from the Afghan embassy in Canberra, dated 23 December 2016. It was submitted, contrary to the applicant's submissions, that the submissions and the letter from the Afghan embassy were considered in the delegate's decision at CB 191. The delegate stated as part of the decision:

His migration agent responded with submissions... which are further discussed in Part 4 below. As part of his migration agent's submissions the applicant reiterated his Afghan passport was a genuine document in his Afghan identity card had been obtained by an '*agent*' who travelled to Afghanistan to obtain it from the Afghan authorities on his behalf. I (the delegate) am aware that all Afghans are required to "return to the family's place of residence, or to Kabul, to apply for [a] tazkera. I do not accept that an '*agent*' would be able to obtain Afghan identity card on behalf the applicant as claimed.

45 In relation the forensic document examiner's report, the delegate noted that he had received the report. The Court would be slow to infer that the evidence did not include the document examination report, particularly in circumstances where the delegate found that the Afghan passport was a bogus document not because it was counterfeit or altered by a person had who did not have the authority to do so, but because it had been obtained fraudulently from the Afghan authorities in Pakistan. That finding is not subject to any ground of review.

CONSIDERATION

46 At the commencement of the hearing, leave was granted for the applicant to rely upon the Amended Originating Application that had been filed in Court and that was attached to the Applicant's written submissions.

47 The term bogus document is defined within s 5(1) of the *Act* as follows'

"bogus document" , in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

48 Sections 91W and 91WA of the *Act* are as follows:

Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
 - (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or
 - i. has taken reasonable steps to produce such evidence.

- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
- (e) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (f) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

49 The applicant asserts that the delegate incorrectly applied the test in ss 91W and 91WA of the *Act* in considering whether the applicant produced a bogus document.

50 It was common ground between the parties that the Afghan passport was a genuine document issued to the applicant in his claimed identity. This was verified by the Afghan Embassy in Canberra and by a forensic document examiner who examined the passport. The fact that it was a genuine document does not mean it is not a bogus document for the purposes of the *Act*. A fraudulently obtained document, even though the document itself is genuine, meets the definition of a bogus document.

51 Firstly, the Court is satisfied that the delegate only considered the Afghan passport and Taskera or ID document for the purposes of whether the applicant produced a bogus document. The Court is satisfied that these documents were produced by the applicant in relation to his Protection visa application. The other documents referred to in the decision

under the heading ‘Part 3 Identity Assessment’ did not form any part of the assessment under s 91WA of the *Act*. The documents that the delegate considered are set out in the bullet points under this heading and do not include any other documents that may have been otherwise provided by the applicant previously or by another person. This aspect of the claim [paragraph (a)(i)] is factually incorrect and has no merit.

52 In terms of paragraph (a)(ii) and paragraph (g)(i), irrelevant considerations, again the Court is satisfied that these did not feature in the delegate’s decision making process as to the provision of bogus documents. The other documents only formed part of the delegate’s consideration in relation to the identity of the applicant. This aspect of the application has no merit.

53 In relation to the claim that the delegate failed to take into account relevant considerations (paragraph h) and did not complete his task (paragraph j) the Court accepts that there are no specified matters the delegate was required to take into account in forming the suspicion the documents were bogus.

54 In terms of matters that were suggested to be relevant, the delegate before making his final decision was provided with a letter from the Afghan Embassy in Canberra indicating that the passport was genuine. The delegate further had the report of the document examiner who also confirmed the passport to be genuine. This material, however, did not address the question of the suspicion that the document was bogus in the sense that it had been fraudulently obtained. The delegate did not accept the explanation that the Taskera was obtained by an agent who travelled to Afghanistan to obtain it on behalf of the applicant. Based on relevant country information, this was a finding that was open to the delegate. The delegate went on to find it was a counterfeit document. The Court is satisfied that finding was open to the delegate for the reasons given.

55 In relation to the Afghan passport, the delegate clearly considered the letter from the Afghan Embassy but placed no weight on it. Although not specifically referred to, the delegate did state that they had considered “all the available evidence”. Noting the final decision was made after the receipt of the document examiners report, the Court is satisfied that it was taken into account.

56 The issue was not whether the passport was a genuine passport in the identity claimed by the applicant, clearly it was. The issue being considered by the delegate was whether the passport

had been fraudulently obtained. The delegate, in coming to that conclusion, noted numerous inconsistencies in the applicant's evidence as to how the applicant had obtained the passport.

57 The Court is satisfied that the delegate completed the task required of them and did engage with the submissions made by the applicant through his migration agent. The Court is not satisfied that the delegate came to the matter with other than an open mind. The decision record clearly sets out the numerous inconsistencies in the applicant's various accounts over time.

58 However, in relation to the finding under s 91W(2) and (3) of the *Act*, the consideration was a separate and discrete exercise that only took into account those matters relevant to the finding that the documents were bogus. It did not include a consideration of irrelevant matters for that discrete purpose.

59 The single ground of judicial review has no merit.

CONCLUSION

60 Accordingly, the application is dismissed.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Humphreys.

Deputy Associate:

Dated: 18 February 2022